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JANET NAPOLITANO, as Secretary of the
Department of Homeland Security

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

FRANK JOSEPH CARDERELLA,

No. CV09-8299 R (MANx)

Plaintiff,

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JANET NAPOLITANO, as Secretary
of the Department of Homeland
Security.

STATEMENT OF UNCONTROVERTED FACTS AND CONCLUSIONS OF LAW

[Fed. R. Civ. Proc. 56; Local Rule 56-1]

Defendant.

Honorable Manuel L. Real

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After consideration of the papers in support of, and in opposition to, the Motion for Summary Judgment filed by defendant Janet Napolitano, in her official capacity as Secretary of the Department of Homeland Security, (“Defendant”), the Court determines that the following facts have been established as uncontested:

UNCONTROVERTED FACTS

The General INS Selection Process

1. In late 1995 and throughout 1996, the Immigration and Naturalization Service (“INS”) sought to increase its workforce by hiring hundreds of new employees. In particular, the Los Angeles Field Office received approval to increase the number of DEOs by more than 50%. (Declaration of Beverly K. Wilson [“Wilson Decl.”], ¶ 2.)

2. INS's custom and practice for the selection of DEOs at this time was as follows: First, the INS personnel office would review the applications and create a list of qualified applicants, i.e., those individuals who met specific criteria for the position. Second, the administrative assistants or supervisory detention enforcement officers would contact the applicants to arrange interviews. Before any interviews were conducted, however, a list of questions relevant to the position were created for the interview panels to ask each applicant. Each interview panel consisted of two to three INS employees. The panels were not allowed to deviate from the list of questions in order to make certain that each applicant was asked the same questions, regardless of who was on the panel. (*Id.*, ¶¶ 4-5.)

3. The panels then would interview the applicant based on the list of set questions. Each interviewing official on the panel would complete a written evaluation regarding the applicant and also submit a written recommendation for each applicant: “not recommended,” “recommended” or “highly recommended.” These evaluations and recommendations then would be forwarded to Beverly Wilson, who was the Deputy Assistant District Director for Detention and Deportation at the time of the incident alleged in the Complaint. (*Id.*, ¶ 6.)

4. As Deputy Assistant District Director, Mrs. Wilson would make final recommendations for the DEO positions by submitting the applications of those individuals who had been graded “highly recommended” by the interviewing officials to the District Director, who at the time of the incident alleged in the Complaint, was Richard Rogers. Director Rogers generally would concur and authorize selections based on the final recommendations. (*Id.*, ¶¶ 6-7.)

Plaintiff Applies for the DEO Position

5. Plaintiff states that he is a white Catholic male of Italian descent. In November, 1995, Plaintiff applied for a Detention Enforcement Officer (“DEO”) position with the Immigration and Naturalization Service (“INS”) in the Los Angeles Field Office. (Compl., ¶¶ 5 & 9.)

6. Defendant currently has no records or files regarding the particular vacancy announcement that Plaintiff applied under for the DEO position. The respective INS offices, or Office of Personnel Management, that could have advertised this particular vacancy announcement during this period followed a two-year file retention schedule for vacancy announcements. (Declaration of Linda M. Smithson, ¶¶ 2-3.)

7. Since the relevant vacancy announcement occurred in 1995-1996, these records are past the two-year retention schedule and appear to have been destroyed in accordance with that schedule. (*Id.*, ¶ 4.)

8. There were approximately 25 available DEO positions under this vacancy announcement. (Declaration of AUSA Sekret T. Sneed (“Sneed Decl.”], ¶ 2, Ex. A, at pp. 40:21-41:8.)

9. Also in November, 1995, Plaintiff applied for an immigration inspector position with INS, specifically requesting the geographic area of San Diego-San Ysidro, California. (Declaration of Robert L. Turner, ¶ 2, Ex. A.)

1 10. At the time Plaintiff applied for the DEO and immigration inspector
2 positions in November 1995, he was employed by the Federal Bureau of Prisons as a
3 case manager at the Federal Correctional Institution in Terminal Island. (Sneed Decl.,
4 ¶ 2, Ex. A at p. 18:12-14.)

5 11. In or around March 1996, INS hired Plaintiff as an immigration inspector
6 in San Ysidro, California. (*Id.*, at p. 77:20-22.)

7 12. After Plaintiff began working as an immigration inspector, Plaintiff
8 learned that the INS wanted to telephonically interview him for the DEO position. In
9 or around May 1996, Rafael Roldan, who at the time of the interview was an INS
10 Detention and Deportation Officer, and Denise Weaver-Lopez, who at the time of the
11 interview was an INS Deportation Officer, interviewed Plaintiff. (*Id.*, at pp. 35:12-
12 39:15.)

13 13. Officer Roldan and Officer Weaver-Lopez ultimately recommended
14 Plaintiff for the DEO position. (Compl., ¶ 9.)

15 14. Mrs. Wilson does not remember the identities of the individuals who were
16 on the list of “highly recommended” applicants that she received for the vacancy
17 announcement at issue here. She also does not remember who she recommended to
18 Director Rogers for selection for this particular announcement. (Wilson Decl., ¶ 9.)

19 15. It was Mrs. Wilson’s custom and practice, however, to never make any
20 decisions for hiring or selection based on any prohibited characteristics, like race,
21 national origin, religion or sex. (*Id.*, ¶ 10.)

22 16. Further, it was Mrs. Wilson’s custom and practice to consider the
23 recommendations from the interviewing officials and to verify that those applicants
24 recommended by the interviewing officials met the minimum qualifications for the
25 position. The interviewing officials’ recommendations never included any information
26 regarding an applicant’s race, national origin, or religion, and Mrs. Wilson never

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1 attempted to discover this information in any way prior to, during, or after making a
2 decision for hiring or selection. (*Id.*)

3 17. Mrs. Wilson always followed this custom and practice in making final
4 recommendations for hiring, and, as a result, she knows that she followed such custom
5 and practice in hiring for the vacancy announcement that Plaintiff applied for. (*Id.*)

6 18. Moreover, at the time of the incident alleged in the Complaint, Mrs.
7 Wilson had not yet met Plaintiff, and she did not know Plaintiff's race, national origin,
8 or religion when she made final recommendations for filling the DEO positions. (*Id.*, ¶
9 11.)

10 **Plaintiff Learns That He Is Not Selected**

11 19. On September 15, 1996, Plaintiff inquired about his application for the
12 DEO position and learned that he had not been selected. (Compl., ¶¶ 1 & 4; Sneed
13 Decl., ¶ 2, Ex. A at pp. 46:13-47:15.)

14 20. On or about September 25, 1996, Plaintiff contacted a counselor with the
15 INS Office of Equal Employment Opportunity, claiming that he had not been selected
16 for the position on the basis of his race, national origin, religion and sex. (*Id.*, at p.
17 53:6-20.)

18 21. Plaintiff did not know Mrs. Wilson at the time he applied for the DEO
19 position. Moreover, Plaintiff cannot set forth evidence that Mrs. Wilson knew his race,
20 national origin, and/or religion at the time she made final recommendations for the
21 DEO positions. (*Id.*, at pp. 68:5-69:7 & 74:2; Wilson Decl., ¶ 11.)

22 22. Plaintiff also has no evidence regarding the qualifications, race, national
23 origin, religion or sex of the vast majority of the individuals who were selected to fill
24 the DEO positions. (Sneed Decl., ¶ 2, Ex. A at pp. 41:9-43:10, 66:22-67:5, 81:14-
25 82:17 & 84:12-85:28.)

26 23. Plaintiff now admits that his religion and sex did not play a role in his
27 non-selection. (*Id.*, at p. 95:4-20.)

24. An INS workforce profile summary reflects that in the Los Angeles District, as of March 31, 1997, there were 32 total white DEOs (Grades 4 to 7), 17 total black DEOs (Grades 4 to 7), 27 total Hispanic DEOs (Grades 4 to 7), and 7 total Asian DEOs (Grades 4 to 7). (Sneed Decl., ¶ 3, Ex. B.)

25. The workforce profile summary also reflects that there were 75 total male DEOs (Grades 4 to 7) and 8 total female DEOs (Grades 4 to 7). (Sneed Decl., ¶ 3, Ex. B.)

CONCLUSIONS OF LAW

26. Summary judgment “should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.” Fed. R. Civ. Proc. 56(c)(2).

27. “[T]he mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-248 (1986) (emphasis in original). Thus, “[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted.” *Id.* at 248.

28. Summary judgment, therefore, must be granted “against a party who fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial . . . since a complete failure of proof concerning an essential element of the nonmoving party’s case necessarily renders all other facts immaterial.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-323 (1986). Moreover, a party opposing a summary judgment motion “may not rely merely on allegations or denials in its own pleading; rather, its response must . . . set out specific facts showing a genuine issue for trial. If the opposing party does

1 not so respond, summary judgment should, if appropriate, be entered against that
 2 party.” Fed. R. Civ. Proc. 56(e)(2). Summary judgment is appropriate here because
 3 Plaintiff cannot present any genuine issue of material fact that Defendant discriminated
 4 against him.

5 29. Title VII prohibits an employer from discriminating “against any
 6 individual with respect to his compensation, terms, conditions, or privileges of
 7 employment, because of such individual’s race, color, religion, sex, or national origin.”
 8 42 U.S.C. § 2000e-2(a)(1).

9 30. In a Title VII case alleging disparate treatment, the plaintiff has the initial
 10 burden to prove “by the preponderance of the evidence a prima facie case of
 11 discrimination.” *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 252-253
 12 (1981). To establish a prima facie case of disparate treatment in hiring under Title VII,
 13 a plaintiff must demonstrate: (1) he is a member of a protected class, (2) he applied for
 14 and was qualified for the position that he applied for, (3) he was denied employment,
 15 despite his qualifications, and (4) the position remained open and the employer sought
 16 other similarly-qualified individuals outside the plaintiff’s protected class. *See*
 17 *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). Stated differently, the
 18 plaintiff must prove that the employer “treat[ed] some people less favorably than
 19 others because of their race, color, religion, sex, or national origin.” *United States*
 20 *Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 715 (1983) (citations and
 21 quotations omitted). *See also Burdine*, 450 U.S. at 258 (“[I]t is the plaintiff’s task to
 22 demonstrate that similarly situated employees were not treated equally”).

23 31. Plaintiff satisfies the first three criteria to establish a prima facie case of
 24 discrimination, i.e., that he is a member of a protected class, that he applied for and
 25 was qualified for the DEO position and that he was denied employment, despite his
 26 qualifications. Plaintiff, however, cannot satisfy the final criteria, i.e., that INS filled
 27 the DEO position with similarly-qualified individuals outside Plaintiff’s protected
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1 class. Specifically, Plaintiff cannot set forth any facts that establish none of the
2 individuals who INS selected to fill the approximately 25 DEO positions were white,
3 Italian, Catholic and/or male. Indeed, the INS March 31, 1997 workforce profile
4 summary demonstrates that there were more white DEOs than any other race, or
5 national origin, and that were more male DEOs than females. Moreover, Plaintiff
6 admits that he does not know background information about the majority of the
7 individuals selected to fill the DEO positions at all.

8 32. Plaintiff also specifically admitted at deposition that he does not believe
9 his religion, or sex, was a basis for his non-selection.

10 33. Plaintiff, therefore, cannot set forth any facts that he was similarly situated
11 to the individuals who were eventually hired, or that he was treated less favorably
12 because he was a different race, national origin, religion, or sex than the individuals
13 who eventually were hired.

14 34. Thus, Plaintiff cannot make a showing of a *prima facie* case of
15 discrimination, and, as a result, Defendant is entitled to summary judgment. *See*
16 *Moran v. Selig*, 447 F.3d 748, 756-757 (9th Cir. 2006) (holding employer entitled to
17 summary judgment where plaintiff-employees failed to establish that they were
18 similarly situated to others who they claimed were treated more favorably); *Leong v.*
19 *Potter*, 347 F.3d 1117, 1125 (9th Cir. 2003) (same).

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1 35. Judgment shall be entered in Defendant's favor consistent herewith.
2 ACCEPTED. (R)

3 Dated: Sept. 20, 2010

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6 HONORABLE MANUEL L. REAL
7 UNITED STATES DISTRICT COURT JUDGE

8 Respectfully submitted,
9 ANDRÉ BIROTTÉ JR.
10 United States Attorney
11 LEON W. WEIDMAN
12 Assistant United States Attorney
13 Chief, Civil Division

14 /s/
15 SEKRET T. SNEED
16 Assistant United States Attorney

17 Attorneys for Defendant
18 JANET NAPOLITANO, as Secretary of the
19 Department of Homeland Security

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